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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

GENERAL MOTORS CORPORATION,
Petitioner,

v.

ROGER W. TRACY, TAX COMMISSIONER OF OHIO,
Respondent.

On Writ of Certiorari to the Supreme Court of Ohio

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

		Page
TABLE OF AUTHORITIES		ii
I.	THE LEGISLATURE'S INTENT IS IRRELEVANT	1
II.	THE EXEMPTION IS DISCRIMINATORY	1
	A. "The Law Grants A Generally-Applicable Exemption"	3
	B. "No Geographic Barriers To Becoming A Public Utility"	3
	C. "No Discrimination Based On Origin Of Goods"	4
	D. "Differential Treatment Of Different Businesses And Different Transactions Does Not Constitute Facial Discrimination"	6
	E. "Ohio Denies The Exemption To In-State Marketers And To Virtually All Industrial Consumers Of Natural Gas"	10
III.	THE DISCRIMINATION CANNOT BE JUSTIFIED	11
	A. Local Utilities' Regulatory Burdens Cannot Justify The Discrimination	11
	B. The Exemption Is Not "Compensatory" For The Gross Receipts Tax	12
IV.	CONGRESS HAS NOT RATIFIED THE DISCRIMINATION	14
V.	THE DISCRIMINATORY TAX EXEMPTION ALSO VIOLATES THE EQUAL PROTECTION CLAUSE	16
CONCLUSION		18

TABLE OF AUTHORITIES

Cases **Page**

Alaska v. Arctic Maid, 366 U.S. 199 (1961) 8
Allied Stores of Ohio, Inc. v. Bowers, 358 U.S. 522 (1959) 16
Amerada Hess Corp. v. Director, Division of Taxation, 490 U.S. 66 (1989) 1, 3, 8, 9
American Trucking Ass'ns v. Scheiner, 483 U.S. 266 (1987) 4
Associated Industries of Mo. v. Lohman, 114 S. Ct. 1815 (1994) 1, 5, 8, 13
Bacchus Imports, Ltd. v. Dias, 468 U.S. 263 (1984) 2, 3, 5, 8, 11
Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511 (1935) 11
Boston Stock Exchange v. State Tax Comm'n, 429 U.S. 318 (1977) 4
Brimmer v. Rebman, 138 U.S. 78 (1891) 10
C & A Carbone, Inc. v. Town of Clarkstown, 114 S. Ct. 1677 (1994) 8
Carnegie Natural Gas Co. v. Tracy, No. 94-K-526, Ohio Tax Rep. (CCH) ¶ 402-254 (Ohio Bd. Tax App. 1995) 2
CTS Corp. v. Dynamics Corp. of America, 481 U.S. 69 (1987) 7
Dean Milk Co. v. City of Madison, 340 U.S. 349 (1951) 10, 14
Dunbar-Stanley Studios, Inc. v. Alabama, 393 U.S. 537 (1969) 7
Exxon Corp. v. Governor of Maryland, 437 U.S. 117 (1978) 9
Federal Power Comm'n v. East Ohio Gas Co., 338 U.S. 464 (1950) 15
Fort Gratiot Sanitary Landfill v. Michigan Department of Natural Resources, 504 U.S. 353 (1992) 10
Fulton Corp. v. Faulkner, 116 S. Ct. 848 (1996) 8, 12, 13
Guy v. Baltimore, 100 U.S. 434 (1880) 8

TABLE OF AUTHORITIES (Cont'd.)

Page

Halliburton Oil Well Cementing Co. v. Reily, 336 U.S. 64 (1963) 5, 6
H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525 (1949) 8
Hughes v. Oklahoma, 441 U.S. 322 (1979) 11, 13
Hunt v. Washington Apple Advertising Comm'n, 432 U.S. 333 (1977) 1
Kraft General Foods, Inc. v. Iowa Department of Rev. & Finance, 505 U.S. 71 (1992) 6
Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356 (1973) 17
Lewis v. BT Investment Managers, Inc., 447 U.S. 27 (1980) 5
Maine v. Taylor, 477 U.S. 131 (1986) 14, 15
Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974) 2
Metropolitan Life Insurance Co. v. Ward, 470 U.S. 869 (1985) 17
Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575 (1983) 13
Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 (1981) 9
New Energy Co. of Indiana v. Limbach, 486 U.S. 269 (1988) 5, 8
New York Rapid Transit Corp. v. City of New York, 303 U.S. 573 (1938) 11
Nordlinger v. Hahn, 505 U.S. 1 (1992) 16
Northwest Central Pipeline Corp. v. State Corp. Comm'n of Kansas, 489 U.S. 493 (1989) 16
Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450 (1959) 8
Oklahoma Tax Commission v. Jefferson Lines, Inc., 115 S. Ct. 1331 (1995) 5
Oregon Waste Systems, Inc. v. Department of Environmental Quality, 114 S. Ct. 1345 (1994) 1, 13

TABLE OF AUTHORITIES (Cont'd.)

Page

Philadelphia v. New Jersey, 437 U.S. 617 (1978) 1
South-Central Timber Development, Inc. v. Wunnicke, 467 U.S. 82 (1984) 14
Sporhase v. Nebraska, 458 U.S. 941 (1982) 14
Toomer v. Witsell, 334 U.S. 385 (1948) 4
United States v. Public Utilities Comm'n of California, 345 U.S. 295 (1953) 14
West Lynn Creamery, Inc. v. Healy, 114 S. Ct. 2205 (1994) 8, 11
Westinghouse Electric Corp. v. Tully, 466 U.S. 388 (1984) 4, 5
Wyoming v. Oklahoma, 502 U.S. 437 (1992) 8

Statutes

15 U.S.C. § 717 (1994) 14, 15, 16
Ohio Rev. Code Ann. § 5727.33 (Anderson 1996), *as amended by* H.B. No. 476, 121st Ohio Gen. Assembly (1996) 12
Ohio Rev. Code Ann. § 5727.38 (Anderson 1996) 12
Ohio Rev. Code Ann. § 5739.02 (Anderson 1996), *as amended by* S.B. No. 310, 121st Ohio Gen. Assembly (1996) 3, 6
Ohio Rev. Code Ann. § 5739.025 (Anderson 1996) . . . 12, 13
Ohio Rev. Code Ann. § 5741.02 (Anderson 1996) 6, 12

Miscellaneous Authority

H.R. Rep. No. 899, S. Rep. No. 817, 83d Cong., 2d Sess. (1953), *reprinted in* 1954 U.S.C.C.A.N. 2101 . . 15
Ohio Tax Rep. (CCH) ¶ 60-120 (1995) 13

REPLY BRIEF FOR PETITIONER

Many of the showings made in General Motors' opening brief (GM Br.) are simply not contested in the Tax Commissioner's brief (R. Br.). For instance, the Commissioner makes no effort to defend the Ohio Supreme Court's holding that GM lacked standing to challenge a tax that it paid (Pet. App. 4a), apparently conceding the Ohio court's error. And even when the Commissioner does address GM's arguments, his hodgepodge of responses largely consists of efforts to reargue well-established law, efforts that are wholly insufficient to save the discriminatory tax.

I. THE LEGISLATURE'S INTENT IS IRRELEVANT

The Commissioner argues that the Ohio legislature did not have a discriminatory motive when it first passed the exemption provision. (R. Br. 16-17) We do not understand the relevance of this argument. As GM showed in its opening brief (GM Br. 17 & n.14), this Court has repeatedly held that "a court need not inquire into the purpose or motivation behind a law to determine that *in actuality* it impermissibly discriminates against interstate commerce." *Associated Industries of Mo. v. Lohman,* 114 S. Ct. 1815, 1824 (1994) (emphasis added). A showing of such "discriminatory intent" is always sufficient, but never necessary, to prove a Commerce Clause violation. *Amerada Hess Corp. v. Director, Div. of Taxation,* 490 U.S. 66, 75 (1989). This is so because "the evil of protectionism" is present wherever interstate commerce is disfavored. *Philadelphia v. New Jersey,* 437 U.S. 617, 626 (1978). Thus, just as in *Hunt v. Washington Apple Advertising Comm'n,* 432 U.S. 333, 352 (1977), the Court "need not ascribe an economic protection motive . . . to resolve this case."

II. THE EXEMPTION IS DISCRIMINATORY

The Commissioner does not dispute the well-established rule that where a taxing statute facially discriminates against interstate commerce, a "virtually *per se*" rule of unconstitutionality applies. *Oregon Waste Systems, Inc. v. Department of Environmental Quality,* 114 S. Ct. 1345, 1350 (1994). However, in an effort to prevent GM from "harvesting the benefits of the rule of 'virtually

per se' invalidity" (R. Br. 27), the Commissioner claims that the exemption statute is not facially discriminatory.

That is demonstrably incorrect. As authoritatively construed by the Supreme Court of Ohio, the exemption statute allows a sales and use tax exemption only when natural gas is purchased from a company that "own[s] or operate[s] the transportation and distribution equipment and deliver[s] the natural gas to consumers *in Ohio*." Pet. App. 3a (emphasis added). In other words, the exemption is *only* available when the purchase is made from an Ohio public utility, and even the Commissioner does not seriously contend otherwise.[1] By favoring only purchases made from local public utilities, the statute facially discriminates.

The Commissioner cannot distinguish *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), which, like this case, also involved a sales and use tax exemption for local products. The exemption in *Bacchus* (which applied only to two in-state liquors) violated the Commerce Clause because it was not available to purchases of other liquors, mostly originating out-of-state, which competed with the local liquors. As GM showed in its opening brief (GM Br. 14-15), the Ohio exemption suffers from the same constitu-

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[1] At one point in his brief, however, the Commissioner appears to suggest a different construction of the statute. (R. Br. 29) Citing a decision of the Ohio Board of Tax Appeals, *Carnegie Natural Gas Co. v. Tracy*, No. 94-K-526, Ohio Tax Rep. (CCH) ¶ 402-254 (Ohio Bd. Tax App. 1995), the Commissioner suggests that, "potentially," the exemption statute "may well" extend to purchases of natural gas from out-of-state public utilities. The Multistate Tax Commission (MTC), *amicus curiae* for the Commissioner, more strongly urges this construction of the statute. Of course, the Ohio Supreme Court's construction is binding upon this Court. *E.g., Memorial Hospital v. Maricopa County*, 415 U.S. 250, 256 (1974). The suggestion that purchases from out-of-state utilities might be exempt is also flatly contradicted by the testimony of the Commissioner's representative that "natural gas purchased from an out-of-state seller of natural gas and delivered to a consumer outside the State of Ohio could [n]ever qualify for the exemption." J.A. 88.

tional defect: it "applies only to locally-[sold gas], even though it does not apply to all such products." *Id.* at 271. Thus, the statute here discriminates just like the one struck down in *Bacchus*, because it "appl[ies] exclusively to a localized industry"[2] — local public utilities, and the local purchases made from them.

Nonetheless, the Commissioner offers five arguments in support of his position that the exemption is nondiscriminatory — all of them unsupported.

A. "The Law Grants A Generally-Applicable Exemption"

The Commissioner claims that the exemption is not discriminatory because it is "generally-applicable." (R. Br. 20) By "generally-applicable" the Commissioner plainly does not mean that the exemption applies to all purchases of natural gas; rather, he apparently means that the same statute, Ohio Rev. Code Ann. § 5739.02(B)(7), also provides exemptions for other types of local purchases from other types of local public utilities — "electric compan[ies]," "water-works compan[ies]," and "heating compan[ies]." The Commissioner cannot seriously defend the exemption on the ground that it also favors purchases from local public utilities that distribute electricity, water, and heat.

B. "No Geographic Barriers To Becoming A Public Utility"

The Commissioner also claims that the exemption is nondiscriminatory because it imposes "[n]o geographic barriers to becoming a public utility." (R. Br. 21) The court below authoritatively construed the exemption statute to require the seller to own and operate the delivery equipment "and deliver the natural gas to consumers *in Ohio*" (Pet. App. 3a (emphasis added)) Thus, for a seller to gain such Ohio "public utility" status, it must own and operate delivery and transportation

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[2] *Amerada Hess Corp. v. Director, Div. of Taxation*, 490 U.S. 66, 76 (1989) (discussing *Bacchus*).

equipment *in Ohio*, and deliver gas to consumers *in Ohio*. There is no way for a seller to satisfy this requirement short of moving its operations into Ohio, and becoming a public utility. It has long been established, however, that a state may not use discriminatory taxes "in an attempt to induce 'business operations to be performed in the home State that could more efficiently be performed elsewhere.'" *Westinghouse Electric Corp. v. Tully*, 466 U.S. 388, 406 (1984) (quoting *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318, 336 (1977)) (internal quotation omitted).

In any event, this "choice" available to sellers of gas does nothing to eliminate the discrimination experienced by gas *purchasers* such as GM. By extending the exemption only to buyers who purchase gas from in-state public utilities, Ohio "forecloses tax-neutral decisions" by gas purchasers. *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. at 331. The exemption provision necessarily has the impermissible effect of encouraging purchasers to shop for their natural gas supplies at home in Ohio, rather than on the interstate market. It "exerts an inexorable hydraulic pressure" on purchasers such as GM to purchase "within the State . . . rather than 'among the several States,'" *American Trucking Ass'ns v. Scheiner*, 483 U.S. 266, 286-87 (1987), and "impos[es] an artificial rigidity on the economic pattern of the industry." *Toomer v. Witsell*, 334 U.S. 385, 404 (1948).

C. "No Discrimination Based On Origin Of Goods"

The Commissioner next claims that "the statute . . . does not draw any distinctions based on where the natural gas originated." (R. Br. 20) We are at a loss to understand this theory. The Commissioner appears to claim that the Commerce Clause would only bar Ohio from discriminating against gas extracted from the ground outside the state and that favoring local sales of gas is

permissible.[3] This argument is without substance. The Clause prohibits discrimination against interstate commerce of all types — it prohibits discrimination against out-of-state goods whether they are produced out-of-state (*e.g., Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263), sold out-of-state (*e.g., Associated Industries of Mo. v. Lohman*, 114 S. Ct. 1815), or shipped from another state. *See, e.g., Westinghouse Electric Corp. v. Tully*, 466 U.S. 388. The Clause also bars discrimination against out-of-state businesses whether they be producers (*e.g., New Energy Co. of Indiana v. Limbach*, 486 U.S. 269, 274 (1988)), or sellers (*e.g., Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27 (1980)).

This Court has previously struck down states' efforts to favor businesses that maintain distribution and sales facilities in-state. In *Westinghouse Electric Corp. v. Tully*, this Court held a New York income tax credit, given only for products "shipped from a regular place of business of the taxpayer within [New York]," to be facially discriminatory. 466 U.S. at 393, 406-07 (internal quotation omitted). Similarly, in the use tax cases (*e.g., Associated Industries v. Lohman, supra; Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64 (1963)), this Court has established the principle that out-of-state retailers need not maintain sales facilities within the taxing state in order to obtain equal treatment of their goods as compared to their in-state retail competitors.

In short, the Clause is not as narrow as the Commissioner would have it: It prohibits all discrimination "against foreign enterprises competing with local businesses," *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 115 S. Ct. 1331, 1344 (1995), and protects those who choose to purchase goods from out-of-state sellers instead of in-state sellers. *See, e.g., Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. at 72. The Commerce Clause is not limited to barring discrimination against goods "produced" out-of-state.

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[3] The Multistate Tax Commission echos this position in its *amicus* brief. (Multistate Tax Comm'n Br. at 24-26)

D. "Differential Treatment Of Different Businesses And Different Transactions Does Not Constitute Facial Discrimination"

The Commissioner then urges that discrimination is absent because Ohio may favor purchases of gas from local public utilities on the ground that non-utility sellers and local public utilities "are not 'similarly situated'" — the differences resulting from the unique "yoke of utility status." (R. Br. 24, 25; *see generally* R. Br. 18-20, 23-29) This theory also cannot save the statute.

First, the Commissioner erroneously relies, as he does throughout his brief, upon supposed differences between utility and non-utility sellers. But the tax and tax exemption statutes at issue here are plainly sales and use taxes, imposed upon the purchase or use of the commodity, the liability for which falls upon the purchaser or user of the commodity. Like most sales and use taxes, the tax is upon the consumer. Ohio Rev. Code Ann. §§ 5739.02, 5741.02(A). However, the Commissioner erroneously treats the challenged taxes as, somehow, a tax on the *sellers* of natural gas.

This misplaced focus only diverts attention from the proper Commerce Clause inquiry: "In considering claims of discriminatory taxation under the Commerce Clause . . . it is necessary to compare *the taxpayers* who are 'most similarly situated.'" *Kraft General Foods, Inc. v. Iowa Dep't of Rev. & Finance,* 505 U.S. 71, 80 n.23 (1992) (emphasis added) (quoting *Halliburton Oil Well Cementing Co. v. Reily,* 373 U.S. at 71). The Commissioner should know this — he relies on this very language from *Kraft*. (R. Br. 18-19) As GM explained in its opening brief (GM Br. 25), the taxpayers (buyers of natural gas) are similarly situated whether they purchase from local utilities or from non-utilities; the sales transactions are identical; the gas is identical whether sold by a local utility or not; and the gas is delivered through the identical interstate pipelines and local distribution companies. Contrary to the Commissioner's urgings (R. Br. 18), those are plainly "substantially equivalent events" appropriate for

a Commerce Clause inquiry. Only those who refuse to buy from local utilities bear the weight of the tax.[4]

Second, no meaningful distinction between utilities and non-utility gas merchants can be drawn here in any event, because each competes with the other in the market for natural gas. The Commissioner concedes as much when he notes that marketers and utilities both are "retailer[s] in the natural gas market," and urges that Ohio may tax the non-utility purchases to avoid "permitting marketers to slice off the benefits of being a public utility but not the burdens." (R. Br. 26; *see also* R. Br. 1-2, 7, 10-11, 14; Pet. Opp. 11 ("[t]he players in the business of selling natural gas are natural gas marketers and natural gas utilities"))[5] It is difficult to imagine a more blatant argument for the protection of local businesses in a competitive marketplace. This Court has repeatedly held that "the Commerce Clause prohibits economic protectionism — that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state

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[4] The Commissioner's misguided focus on the *sellers* instead of the *taxpayers* affects his analysis of other cases as well. *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69 (1987), upheld an Indiana anti-takeover statute because it did not "impos[e] a greater burden on out-of-state offerors than it does on similarly situated Indiana offerors." *Id.* at 88. Here, in contrast, the tax scheme imposes higher taxes on those who purchase gas out-of-state. Likewise, *Dunbar-Stanley Studios, Inc. v. Alabama*, 393 U.S. 537 (1969), found no discrimination against traveling photographers vis-a-vis photographers with a fixed location because, "[o]n the record before [the Court]," there was no discrimination in fact — the appellant (a travelling photographer) had never paid more than $25 in tax in a given year ($25 was the annual tax paid by fixed-location photographers). *Id.* at 542. In contrast, on the record before the Court here, GM was assessed taxes on its gas purchases which it otherwise would have been exempt from had it purchased from a local public utility.

[5] *See also* J.A. 126, 157, 203; GM Br. 2-3, 23-25; Br. *Amici Curiae* of the Chamber of Commerce of the United States *et al.* at 6-8; Br. *Amicus Curiae* of Columbia Gas of Ohio at 4.

competitors." *New Energy Co. of Indiana v. Limbach*, 486 U.S. at 273-74 (citing *Bacchus Imports, Ltd. v. Dias*, 468 U.S. at 270-73, *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 532-33 (1949), *and Guy v. Baltimore*, 100 U.S. 434, 443 (1880)).[6] "[A] direct commercial advantage to local business," in whatever form, is unconstitutional. *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 458 (1959).

Even the Commissioner's own authorities state the principle that the Commerce Clause prohibits such discrimination within competitive markets. He places heavy reliance on *Alaska v. Arctic Maid*, 366 U.S. 199 (1961), for the proposition that there is "no 'iron rule of equality' between taxes laid by a State on different types of businesses." *Id.* at 205 (quoted at R. Br. 18). But the "different types of businesses," in the *Arctic Maid* sense, are those that do not compete with one another. Arctic Maid's freezer ships (which froze fish destined for the cannery) were "different businesses" than the favored freezer ships (which froze fish destined for the retail market in fresh, non-canned fish) because the former "do not *compete with* those who freeze fish for the retail market." *Arctic Maid*, 366 U.S. at 204 (emphasis added). Here, by contrast, the competition between the exempt and the non-exempt sellers is both self-evident as well as established by the record and conceded by the Commissioner.

The Commissioner also relies on *Amerada Hess Corp. v. Director, Div. of Taxation*, 490 U.S. 66, for the proposition that the discrimination in favor of local utility purchases is permissible because it "results solely from differences between the nature of their businesses, not from the location of their activities." 490 U.S. at 78 (quoted at R. Br. 19). In *Amerada Hess*, however, there was no geographic discrimination because the windfall tax

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[6] *See also, e.g., Fulton Corp. v. Faulkner*, 116 S. Ct. 848, 853-54 (1996); *West Lynn Creamery, Inc. v. Healy*, 114 S. Ct. 2205, 2212-13 (1994); *Associated Industries of Mo. v. Lohman*, 114 S. Ct. 1815, 1820 (1994); *C & A Carbone, Inc. v. Town of Clarkstown*, 114 S. Ct. 1677, 1681-82 (1994); *Wyoming v. Oklahoma*, 502 U.S. 437, 454 (1992).

deduction was denied to "oil producers who market their oil" but not to "independent retailers who do not produce oil." *Id.* State lines made no difference to the denial of the deduction.[7] But unlike the statute upheld in *Amerada Hess*, the Ohio exemption *is* dependent upon the utilities' in-state "location of their activities," in particular their sales and delivery activities. (GM Br. 19 n.15 (quotation omitted)) State lines do make a difference here.[8]

Thus, the Commissioner's attempts to draw distinctions between utilities and non-utility sellers of natural gas are irrelevant for Commerce Clause purposes — the taxes are not imposed on those entities, and those entities are "competitors" of one another in the natural gas marketplace, selling precisely the same gas to identical purchasers. The gas is tax-exempt only if it is purchased locally, from a local utility. Such favoritism of local markets and local competitors is impermissible under the Commerce Clause.

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[7] The Commissioner chides GM for "rely[ing] on [an] out-of-state utility hypothetical." (R. Br. 28) But he misses the point of the argument (GM Br. 18-19), which is that the existence of discrimination is confirmed by the fact that the exemption does not apply to *all* purchases from *all* utilities, but only *Ohio* purchases from *Ohio* utilities.

[8] The fact that state lines *are* dispositive of the exemption distinguishes many of the other cases relied upon by the Commissioner. *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 126 (1978) (*see* R. Br. 19), involved a ban on petroleum refiners from owning or operating gas stations in Maryland; "in-state independent dealers [were given] no competitive advantage over out-of-state dealers." *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 471-72 (1981) (*see* R. Br. 22), upheld a prohibition on milk retailers selling their products in plastic, nonreturnable milk containers, "without regard to whether the milk, the containers, *or the sellers* are from outside the State." (Emphasis added.)

E. "Ohio Denies The Exemption To In-State Marketers And To Virtually All Industrial Consumers Of Natural Gas"

Finally, the Commissioner claims that the exemption is nondiscriminatory because it also applies to some in-state purchases — those from in-state non-utility marketers. (R. Br. 22) But GM has shown (GM Br. 12-17) that this Court has rejected such arguments, without exception, for over 100 years. *Brimmer v. Rebman,* 138 U.S. 78 (1891), and its progeny, hold that a tax which discriminates against interstate commerce cannot be saved on the ground that it also disfavors some in-state commerce. The Commissioner, just as he did in opposing GM's petition for certiorari, seeks to exile these cases to a footnote (*compare* R. Br. 21 n.2 *with* Pet. Opp. 14 n.4), and says that "virtually all" of these cases, as well as others relied upon by GM, involved "discrimination based on the origin" of the goods (R. Br. 21 n.2), which the Commissioner contends is not present here. GM has shown above (pp. 4-5, *supra*) that the Commissioner's "place of origin" argument is meritless, and no other distinction of these cases is offered.

The exemption plainly violates *Brimmer*. It works so that no gas — other than gas sold in Ohio by a local utility — is exempt from tax. This situation is indistinguishable from *Brimmer,* where meat slaughtered more than 100 miles from sale could never be exempt from tax. It is indistinguishable from *Dean Milk Co. v. City of Madison,* 340 U.S. 349 (1951), where milk pasteurized and bottled more than five miles from the city could not be sold. And it is indistinguishable from *Fort Gratiot Sanitary Landfill v. Michigan Department of Natural Resources,* 504 U.S. 353 (1992), where waste from outside the county could not be accepted for processing by the landfill. Plainly, under this Court's precedents, the discrimination is no less obnoxious simply because it is partial.

III. THE DISCRIMINATION CANNOT BE JUSTIFIED

Having failed to show that the exemption is nondiscriminatory, the Commissioner offers two justifications in hopes of overcoming the "virtually *per se*" rule of invalidity. It is the Commissioner's burden to prove the existence and validity of these justifications, *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979), and he has failed to do so.

A. Local Utilities' Regulatory Burdens Cannot Justify The Discrimination

According to the Commissioner, the "unique status of public utilities," particularly the regulatory burdens that they but not their competitors encounter, justifies the discrimination.[9] The "sweet" non-regulation enjoyed by non-utilities, it is said, justifies the "bitter" sales and use taxes paid by those who purchase gas from them. (R. Br. 26) This argument is, not surprisingly, unsupported by any case authority.

No decision of this Court has ever suggested such a justification for discrimination. Indeed, this Court has repeatedly rejected states' efforts to justify discrimination on the theory that a home-field advantage is necessary to protect a disadvantaged local industry. *See, e.g., West Lynn Creamery, Inc. v. Healy*, 114 S. Ct. 2205, 2211, 2212-13 (1994); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263; *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 523 (1935). The Commissioner's argument (R. Br. 23-29) instead reveals his true colors: He seeks to sustain the exemption as a measure to protect Ohio's utilities from the newly aggressive

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[9] The Commissioner quotes at length from *New York Rapid Transit Corp. v. City of New York*, 303 U.S. 573, 579 (1938) to prove "the unique status of public utilities." (R. Br. 26) *New York Rapid Transit*, however, was an equal protection case; it did not involve the Commerce Clause at all; and it nowhere suggests that the supposedly "unique" burdens of public utilities can somehow justify discriminatory taxation under the Commerce Clause.

competition from interstate markets, a plainly impermissible goal under the Commerce Clause.

B. The Exemption Is Not "Compensatory" For The Gross Receipts Tax

GM has shown that the sales and use tax on natural gas purchased from non-utility sellers is not, and cannot be justified as, compensatory for other types of taxes that are imposed upon public utilities. (GM Br. 17-18) Nonetheless, the Commissioner — aided by the *amicus curiae* brief of Columbia Gas of Ohio (an Ohio local public utility) — argues that "a comparison between the effective rate of taxation for the two groups shows that marketers are the favored class" when gross receipts taxes and public utility commission assessments are considered. (R. Br. 32) The Columbia Gas brief offers complex mathematical formulae ostensibly designed to prove this point. (*See* Br. *Amicus Curiae* of Columbia Gas of Ohio at 17-28)[10] While neither the Commissioner nor his *amicus* explicitly call this a "compensatory tax" defense, it is just that. And it is meritless by any name.

Fulton Corp. v. Faulkner, 116 S. Ct. 848 (1996), this Court's most recent "compensatory tax" case, establishes that the sales and use tax here cannot be seen as compensatory for the gross receipts taxes imposed upon local utilities (1) because the gross receipts taxes on utilities are imposed at a lower tax rate (4.75% of gross receipts — Ohio Rev. Code Ann. § 5727.38) than the sales and use tax (5 to 7% of purchase price — Ohio Rev. Code Ann. § 5739.025), and (2) because the taxes do not "fall on substantially equivalent events"; indeed, they are not even imposed on the same entity. Ohio Rev. Code Ann. §§ 5741.02(B), 5727.33, 5727.38. Neither the Commissioner nor his *amici* dispute these showings.

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[10] We note that the Commissioner — who bears the burden of establishing any such defense — offered no proofs on this issue in the courts and administrative proceedings below.

This Court should once again reject a state's invitation to "plunge . . . into the morass of weighing comparative tax burdens." *Oregon Waste Systems,* 114 S. Ct. at 1353 (quotation omitted). As reiterated just last term in *Fulton Corp. v. Faulkner,* the Court has repeatedly "decline[d] to shoulder any such analysis," because "'courts as institutions are poorly equipped to evaluate with precision the relative burdens of various methods of taxation.'" 116 S. Ct. at 859 (quoting *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue,* 460 U.S. 575, 589-90 & nn. 12-14 (1983)).[11] The exemption provision cannot be saved as a "compensatory" tax.[12]

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[11] "'The complexities of factual economic proof always present a certain potential for error, and courts have little familiarity with the process of evaluating the relative economic burden of taxes.'" *Fulton Corp. v. Faulkner,* 116 S. Ct. at 859 (quoting *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue,* 460 U.S. 575, 589-90 (1983)). Just such a "potential for error" is inherent in Columbia Gas's analysis, which proceeds from an erroneous assumption. Columbia Gas's mathematical proofs assume a sales or use tax rate of 5%. (Columbia Gas Br. at 20) But because of Ohio local taxes, the sales and use tax rate in certain municipal areas is as high as 7%. *See* Ohio Rev. Code Ann. § 5739.025; *cf. Associated Industries of Mo. v. Lohman,* 114 S. Ct. 1815. Because of these local taxes, GM was assessed tax of 5% for use of gas at its Lordstown assembly plant, 5 to 6% at its Portage County Packard Electric Division facility, 5.5% at its Mahoning County Packard Electric Division facility, and 6% at its central foundry plant in Defiance. *See* Statutory Transcripts at 128, 225-27 (filed by the Commissioner with the Ohio Board of Tax Appeals); Ohio Tax Rep. (CCH) ¶ 60-120, at 7259-84 (1995) (sales and use tax rates by jurisdiction).

[12] Nor can it be justified as a "health and safety" regulation, as the Commissioner halfheartedly suggests in a footnote. (R. Br. 33 n.4; *see also* R. Br. 22) It is intuitively absurd that the discriminatory imposition of a sales and use tax on purchases of natural gas serves a legitimate health and safety purpose that could not be served by available nondiscriminatory means. *Hughes v. Oklahoma,* 441 U.S. 322, 336 (1979). And it is well established that the bare assertion of a public

IV. CONGRESS HAS NOT RATIFIED THE DISCRIMINATION

The Commissioner's last line of defense is to argue that the discrimination has been ratified by Congress. He claims that in 15 U.S.C. § 717(c), Congress "has firmly placed its stamp of approval" upon the discriminatory exemption statute (R. Br. 34), and "has authorized the States to draw the very classification at issue in this case" (R. Br. 33), thus removing all restrictions imposed by the Commerce Clause. The Commissioner has never, until this brief, even hinted at this argument; none of his *amici* supports it;[13] and it is supported neither by this Court's precedents nor by the language of 15 U.S.C. § 717(c).

This Court's cases indicate that, as a necessary precondition to a conclusion "that Congress wished to remove federal constitutional constraints on . . . state laws," this Court must find that "Congress' 'intent and policy' to sustain state legislation from attack under the Commerce Clause'" has been "expressly stated,"[14] in "unmistakably clear" terms.[15] There must be an "unambiguous statement of congressional intent . . . 'to alter the limits of state power otherwise imposed by the Commerce Clause.'"[16] No such "unambiguous statement" exists here.

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health justification, without more, cannot save an otherwise-unconstitutional statute. *Dean Milk Co. v. City of Madison*, 340 U.S. 349, 354 (1951).

[13] The State of Kansas, *et al.*, makes a bare reference to this argument in their *amici curiae* brief. *See* Br. *Amici Curiae* of the State of Kansas *et al.* at 5 n.5.

[14] *Sporhase v. Nebraska*, 458 U.S. 941, 960 (1982) (citations and some internal quotations omitted).

[15] *South-Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82, 91 (1984).

[16] *Maine v. Taylor*, 477 U.S. 131, 139 (1986) (quoting *United States v. Public Utilities Comm'n of California*, 345 U.S. 295, 304 (1953)).

First, section 717(c) nowhere provides the required "unambiguous statement of congressional intent" to cover state sales and use taxes at all. Neither section 717(c), nor any other provision of the Natural Gas Act, speaks in any fashion to state taxation. As the Commissioner properly points out (R. Br. 3, 35-36), section 717(c) was passed in response to the Court's decision in *Federal Power Comm'n v. East Ohio Gas Co.*, 338 U.S. 464 (1950), which held that the Federal Power Commission (the predecessor to the Federal Energy Regulatory Commission, or F.E.R.C.) had jurisdiction to regulate local public utilities. What section 717(c) implemented is what *East Ohio Gas* denied — exclusive regulatory authority for *state public utility commissions* over in-state natural gas transactions — leaving all other, interstate, aspects of the natural gas industry to F.E.R.C.'s national, preemptive jurisdiction. 15 U.S.C. § 717(c); *see also* H.R. Rep. No. 899, S. Rep. No. 817, 83d Cong., 2d Sess. (1953), *reprinted in* 1954 U.S.C.C.A.N. 2101. Section 717(c) was simply not concerned with state taxation: There was no design to return "regulatory" taxing power to state taxing authorities, because *East Ohio Gas* did not threaten such powers in the first instance. *See East Ohio Gas*, 338 U.S. at 476-78 (Jackson, J., dissenting).

However, the Commissioner suggests that in common usage, taxes are "one of the forms of regulation" (R. Br. 37), relying on isolated quotations from unrelated case law. While it may be true that taxation sometimes "regulates," it hardly follows that when Congress used the term "regulation" in section 717(c) it meant to include taxing authority.

Second, even if section 717(c) was meant to preserve state tax jurisdiction, there is no evidence whatsoever that it was designed to authorize discriminatory taxation, contrary to fundamental Commerce Clause principles. *See Maine v. Taylor*, 477 U.S. 131, 139 (1986).

Third, the major thrust of section 717 in particular, and the Natural Gas Act in general, is not to *give* power over interstate transactions to the states, but to *take it away*. Section 717 gives the F.E.R.C. preemptive federal power over "the transportation

of natural gas in interstate commerce, . . . the sale in interstate commerce of natural gas for resale . . ., and . . . natural-gas companies engaged in such transportation or sale." 15 U.S.C. § 717(b); *see also Northwest Central Pipeline Corp. v. State Corp. Comm'n of Kansas,* 489 U.S. 493, 506 (1989). Section 717(c) would not give Ohio jurisdiction over GM's gas purchases because states only have exclusive jurisdiction over persons transporting or selling gas "received . . . within or at the boundary of a State . . ., provided that the rates and service of such person and facilities be subject to regulation by a State commission." 15 U.S.C. § 717(c). *See also Northwest Central Pipeline Corp.,* 489 U.S. at 507. Of course, GM did not "receiv[e the gas] within or at the boundary of" Ohio, but in distant states. (J.A. 30, 41-45; *see generally* GM Br. 5) Nor is GM — or the out-of-state sellers — regulated "by a State commission." Thus, if section 717 speaks to taxes at all, the limited section 717(c) grant of state regulatory jurisdiction suggests federal preemption, not Congressional endorsement, of the discriminatory use taxes paid by GM.

V. THE DISCRIMINATORY TAX EXEMPTION ALSO VIOLATES THE EQUAL PROTECTION CLAUSE

In its opening brief (GM Br. 29-30), GM showed that the tax exemption also violates GM's equal protection rights, by taxing their gas purchases less favorably than those who purchase gas from local public utilities.

In response, the Commissioner first argues that, applying the "modest" rational basis test (R. Br. 39), the exemption statute passes muster under the Equal Protection Clause. While the rational basis test is indeed "modest," it still requires a state to articulate a rational basis that "may conceivably or 'may reasonably have been the purpose and policy' of the relevant governmental decisionmaker." *Nordlinger v. Hahn,* 505 U.S. 1, 15 (1992) (quoting *Allied Stores of Ohio, Inc. v. Bowers,* 358 U.S. 522, 528-29 (1959)). Imposing a tax on buyers from non-utilities such as GM, while exempting identically situated purchasers of identical gas delivered identically, is nothing more than the

differential treatment of identically situated taxpayer-purchasers which the Equal Protection Clause prohibits. However, it appears that the Commissioner argues that the tax rationally encourages purchasers to buy gas from local public utilities so that their regulatory obligations are somehow eased by the additional revenues that tax-exempt status might bring. But that argument cannot justify the tax because "promotion of domestic business within a State," at the expense of out-of-state competitors, "is not a legitimate state purpose." *Metropolitan Life Ins. Co. v. Ward,* 470 U.S. 869, 880 (1985). The discriminatory tax exemption thus flunks even the "modest" rational basis test.

It necessarily follows that the tax exemption also fails the heightened scrutiny applicable under the Equal Protection Clause to statutes which burden interstate commerce. (*See* GM Br. 30-31) The Commissioner says, however, that heightened scrutiny should not apply because the Commerce Clause does not confer sufficiently "fundamental" rights. (R. Br. 39-40) But as this Court explained in *Lehnhausen v. Lake Shore Auto Parts Co.,* 410 U.S. 356 (1973), "[w]here taxation is concerned *and no specific right,* apart from equal protection, is imperiled, the states have large leeway" in making tax classifications. *Id.* at 359 (emphasis added; footnote omitted). As examples of other "specific right[s]" which might be "imperiled," thus requiring a closer judicial look, the Court gave "the First Amendment" as well as the "taxes . . . that discriminated against interstate commerce . . . or required licenses to engage in interstate commerce." *Id.* at 359 n.3.

CONCLUSION

For the foregoing reasons, and for those reasons stated in GM's opening brief, the judgment of the Ohio Supreme Court should be reversed.

Respectfully submitted,

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